

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

CC 91-213

- In the Matter of)
)
Petition for the Extension of the)
Compliance Date under Section 107)
of the Communications Assistance)
for Law Enforcement Act)
by AT&T Wireless Services, Inc.,)
Lucent Technologies Inc., and)
Ericsson Inc.)

To: The Commission

PETITION FOR EXTENSION OF COMPLIANCE DATE

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SUMMARY

AT&T Wireless Services, Inc., ("AWS"), Lucent Technologies Inc., ("Lucent") and Ericsson Inc. ("Ericsson") bring this petition under Section 107(c) of the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. §§ 1001 et seq., seeking an extension of CALEA's October 25, 1998, compliance date to at least October 24, 2000, because CALEA-compliant hardware and software will not be available within the compliance period.

This extension request is urgent. Further development of a CALEA solution in the face of the unstable industry standard would expose the vendors to potentially enormous expense of money and engineering resources because any modification to the existing industry standard could require significant changes in Lucent's or Ericsson's individual CALEA solution. Given the current stage of development, both Lucent and Ericsson will soon reach a "point of no return" whereby development commitments toward the existing standard will become irreversible. Thus, AWS and its vendors require an immediate response to this extension request.

Accordingly, AWS, Lucent and Ericsson request that the Commission grant the extension as soon as possible, effective October 25, 1998, for the full 2-year period.

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A. Petitioners

To meet these obligations, AWS must consult, as necessary, in a timely fashion, "with manufacturers of its telecommunications transmission and switching equipment and its

providers of telecommunications support services." See 47 U.S.C. § 1005(a). AWS has done so on a continuous basis since it first proposed the standardization of electronic surveillance requirements in 1995 under the auspices of the Telecommunications Industry Association ("TIA").¹

Lucent Technologies designs, builds and delivers a wide range of public and private networks, communications systems and software, data networking systems, business telephone systems and microelectronic components. Lucent is one of AWS's telecommunications equipment manufacturers. Lucent has participated in the standards process from the outset in order to make available, on a reasonably timely basis and at a reasonable charge, such features or modifications as are necessary to permit AWS to meet CALEA's assistance capability requirements.

Ericsson designs, builds and delivers a wide range of public and private networks, communications systems and software, data networking systems, business telephone systems and microelectronic components. Ericsson is one of AWS's telecommunications equipment manufacturers. Ericsson has participated in the standards process from the outset in order to make available, on a reasonably timely basis and at a reasonable charge, such features or modifications as are necessary to permit AWS to meet CALEA's assistance capability requirements.

B. The Industry Standard

The Commission is well aware of the history of the development of the industry standard and its adoption on November 20, 1997, as an interim standard.² The Commission

¹ AWS took the industry lead in proposing the standardization of electronic surveillance requirements with the full support and encouragement of law enforcement. AWS also provided the chair of the ad hoc subcommittee. Finally, AWS, by letter agreement with the Department of Justice, funded the editorial function until CALEA funds became available to reimburse AWS (which has yet to occur).

² See In the Matter of Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking, CC Docket No. 97-213, FCC 97-356, released October 10, 1997 [hereinafter "FCC NPRM"], ¶ 44 (recognizing that the industry standard was pending ballot comments); see also FCC NPRM Comments of TIA, filed December 12, 1997, at 6 (advising Commission that TIA had approved and published J-STD-025 as TIA interim standard).

also knows that the Federal Bureau of Investigation ("FBI") has long claimed that the standard is deficient because it does not include certain enhanced surveillance functionality that law enforcement deems important.³

On March 27, 1998, the FBI challenged the industry standard as "deficient" by filing a petition with the Commission under Section 107(b). Further, privacy advocates filed a deficiency petition on March 25, 1998, claiming that the existing industry standard goes too far in providing law enforcement certain capabilities and fails to protect the privacy of communications not authorized to be intercepted.

The Commission now must establish by rule, on the record and with public comment, the technical requirements or standards necessary to implement the assistance capability requirements of CALEA. 47 U.S.C. § 1006(b). With the industry standard now in a de jure limbo, the development of CALEA-compliant technology must await the outcome of the Commission's proceedings.⁴

As the Commission knows, and as the FBI itself has recognized, the ordinary development cycle for hardware and software is 24 months after promulgation of a standard.⁵ There is no dispute that the standardized delivery of electronic surveillance information is critical to the efficient implementation of CALEA. Indeed, law enforcement itself depends on the development and implementation of a standard to develop its collection equipment

³ See FCC NPRM Comments of FBI, filed December 12, 1997, at 37-38.

⁴ It is not the purpose of this petition to comment on the FBI's deficiency petition. Petitioners recognize that the Commission may provide a reasonable time and conditions for compliance with and the transition to any new standard as part of that rulemaking. 47 U.S.C. § 1006(b)(5). Petitioners believe that, at a minimum, the extension requested in this Petition should be granted, but reserve the right to seek a longer period of time based on the complexity of, or any additions to, the industry standard as a result of the deficiency petition rulemaking.

⁵ See FCC NPRM Comments of TIA, at 9 ("Standard industry practice requires 24-30 months of development before manufacturers can even release a software package containing new features."); see also Department of Justice Communications Assistance for Law Enforcement Act Implementation Report to Congress, January 26, 1998, cited in FCC NPRM Reply Comments of Cellular Telecommunications Industry Association ("CTIA"), Attachment D.

necessary to receive surveillance information from carriers.⁶ Accordingly, the absence of a stable standard ensures delay in the delivery of CALEA-compliant technology and underscores the need for an extension of the compliance date.

C. Commission Procedures for Extension

In the FCC NPRM, the Commission stated that October 24, 1998 is the last day by which an extension may be sought and that the Commission may grant an extension of time until October 24, 2000.⁷ The Commission did not promulgate specific rules for submitting requests, but proposed to permit carriers to petition the Commission for an extension on the basis of criteria specified in Section 109 to determine whether it is reasonably achievable for the petitioning carrier to comply.⁸

In its initial and reply comments to the Commission, AWS suggested that the proper criteria for approving a carrier's extension request is a showing that the technology necessary for compliance is not commercially available.⁹ That is the Section 107 test for an extension.¹⁰ No other test should be applied to this petition. The Commission has not promulgated any other rules or guidance for an extension under CALEA.

⁶ It is the understanding of Petitioners that no contracts have been let by the FBI for the development of collection equipment. Thus, even if a carrier was poised to deliver electronic surveillance information consistent with the industry standard or as enhanced by the FBI punch list, law enforcement would not be able to receive it. This further supports the validity of an extension.

⁷ See In the Matter of Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking, CC Docket No. 97-213, FCC 97-356, released October 10, 1997, ¶ 49.

⁸ Id., ¶ 50.

⁹ See FCC NPRM Comments of AT&T Corp., filed December 12, 1997, at 24; and FCC NPRM Reply Comments of AT&T Corp., filed February 11, 1998, at 10.

¹⁰ Of course, the reasonable achievability test may be relevant once the price of CALEA-compliant hardware and software is known.

II. APPLICABLE LAW

A. Petition for Extension

Section 107 of CALEA provides that a telecommunications carrier proposing to install or deploy, or having installed or deployed, any equipment, facility, or service prior to the effective date of Section 103 of CALEA may petition the Commission for one or more extensions of the deadline for complying with the assistance capability requirements of CALEA. 47 U.S.C. § 1006(c)(1). On its face, Section 107 petitions apply to "new" equipment, facilities and services that are not subject to government reimbursement; that is, equipment, facilities or services installed or deployed after January 1, 1995.¹¹

The FBI has defined "installed or deployed" as follows:

Installed or deployed means that, on a specific switching system, equipment, facilities, or services are operable and available for use by the carrier's customers.¹²

Under this definition, a significant amount of AWS's current network was installed or deployed after January 1, 1995.¹³ Further, AWS continues to install equipment, facilities and services throughout its service areas. CALEA-compliant solutions for equipment, services or facilities installed or deployed, or proposed to be installed or deployed, during the compliance period simply are not available.

¹¹ See 47 U.S.C. § 1006(c)(4) ("An extension under this subsection shall apply to only that part of the carrier's business on which the new equipment, facility, or service is used.")(emphasis added). Any equipment, services or facilities installed or deployed prior to January 1, 1995, is deemed to be in compliance with the assistance capability requirements of CALEA until the Attorney General agrees to reimburse carriers for the costs of retrofitting. See 47 U.S.C. § 1008(b).

¹² See 28 C.F.R. § 100.10.

¹³ Neither AWS nor the telecommunications industry agree with the FBI definition of "installed or deployed."

B. Grounds for Extension

Section 107(c) of CALEA provides the following grounds for granting an extension:

The Commission may, after consultation with the Attorney General, grant an extension under this subsection, if the Commission determines that compliance with the assistance capability requirements under section 103 is not reasonably achievable through application of technology available within the compliance period.

47 U.S.C. § 1006(c)(emphasis added). As noted above, neither of AWS's primary vendors will have CALEA-compliant technology available within the compliance period or for up to two years thereafter.

As the Commission no doubt understands, manufacturers have not been idle. However, further proceeding with current development in the face of the unstable industry standard would expose the vendors to potentially enormous expense of money and engineering resources because any modification to the existing industry standard could require significant changes in Lucent's or Ericsson's individual CALEA solution. Given the current stage of development, both Lucent and Ericsson will soon reach a "point of no return" whereby development commitments toward the existing standard will become irreversible. Thus, AWS and its vendors require an immediate response to this extension request.

C. Length of Extension

Section 107 provides that the Commission shall extend the compliance date for the lesser of two years after the date on which the extension is granted or the period the Commission finds is necessary for the carrier to comply. There is no dispute, even with the FBI, that it takes up to 2 years to develop technology to an industry standard. Carriers then need time to field test and deploy the technology. Thus, 2 years may not be enough time to meet the assistance capability requirements of CALEA and further extensions may be necessary.

Accordingly, AWS, Lucent and Ericsson request that the Commission grant the extension, effective October 25, 1998, for the full 2-year period.

D. Conditions for Extension

AWS, Lucent and Ericsson have a statutory obligation under Section 106 of CALEA to continue to consult and cooperate to ensure that CALEA-compliant hardware and software will be available on a reasonably timely basis and at a reasonable charge. No other terms or conditions are necessary or appropriate in granting this petition.¹⁴

E. Obligations Pending Ruling - Tolling

Section 108 of CALEA permits the Attorney General to seek an order in federal district court to enforce CALEA. 47 U.S.C. § 1007. CALEA authorizes penalties of \$10,000 per day per violation. 18 U.S.C. § 2522. Further, standing alone, and without an extension from the Commission or other relief, the absence of a stable standard does not relieve Petitioners from their obligations under CALEA. 47 U.S.C. § 1006(a)(3)(B). Thus, if the Commission fails to act on this petition by October 25, 1998, Petitioners could be subject to an enforcement action even though this extension petition was more than timely filed.

Accordingly, Petitioners request that the Commission expressly toll the CALEA compliance date during the pendency of this petition in the event that the Commission requires longer than the remaining time in the compliance period to decide this matter. Further, if the petition is denied, Petitioners request that the Commission grant a reasonable period of time thereafter to permit Petitioners to comply with the Commission's decision.

¹⁴ Petitioners do not believe that the Commission should, or is empowered to, impose other terms or conditions on this extension. Section 107(b), unlike an extension petition under subsection (c), explicitly authorizes the Commission to provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the carrier's obligations under Section 103 during the transition to a new standard. No such authority is granted to the Commission under the provisions of CALEA pursuant to which this extension is sought.

F. Petition Procedures

CALEA does not specify the nature of the Commission's consultation with the FBI under Section 107. However, Congress made clear that accountability was to be the hallmark of CALEA, stating that "all proceedings before the FCC will be subject to public scrutiny, as well as congressional oversight and judicial review."¹⁵ Thus, the Commission's consultation with the Attorney General must be on the record.¹⁶

¹⁵ See House Report No. 103-827 at 20, reprinted in 1994 U.S.C.C.A.N 3489, 3500 (emphasis added).

¹⁶ This petition is not based on proprietary or confidential information. There is no reason, therefore, to conduct a closed or restricted proceeding.

III. CONCLUSION

For all of the reasons set forth above, AWS, Lucent and Ericsson request that the Commission grant a two-year extension of the CALEA compliance date to October 24, 2000, effective October 25, 1998.

Respectfully submitted,

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Dated: March 30, 1998

DCDOCS:125914.1

CERTIFICATE OF SERVICE

I, Tanya Butler, hereby certify that on this 30th day of March, 1998, a copy of the forgoing "Petition for the Extension of the Compliance Date Under Section 107 of the Communications Assistance for Law Enforcement Act" was delivered by first class, postage prepaid mail, or by hand(*) to the following:


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